

DEC 15 2008

FILED

BEFORE THE DEPARTMENT OF INSURANCE
STATE OF NEBRASKA

IN THE MATTER OF THE)	ORDER APPROVING ACQUISITION
ACQUISITION OF CONTROL OF)	
COMMONWEALTH LAND TITLE)	CAUSE NO. C-1738
INSURANCE COMPANY, IN)	
REHABILITATION and)	
LAWYERS TITLE INSURANCE)	
CORPORATION, IN)	
REHABILITATION.)	

On November 26, 2008, Fidelity National Financial, Inc., ("Applicant") and its subsidiaries, Fidelity National Title Insurance Company and Chicago Title Insurance Company, filed an application ("Form A") seeking approval to acquire control of Commonwealth Land Title Insurance Company, in Rehabilitation, and Lawyers Title Insurance Corporation, in Rehabilitation, (collectively "Title Insurers"), Nebraska domiciled title insurance companies. The application was filed pursuant to the Insurance Holding Company System Act, *Neb. Rev. Stat.* §44-2120, §44-2126 (Reissue 2004). The filing was subsequently supplemented on December 10, 2008; amended December 11, 2008; and further amended December 12, 2008. A Notice of Public Hearing was issued December 4, 2008.

On December 15, 2008, a public hearing was held before Ann M. Frohman, Director of the Nebraska Department of Insurance ("Department"). Angela Comeau, a certified court reporter, recorded the hearing. Christine Neighbors, General Counsel, represented the Department and Jim Nixon and Bruce Ramage appeared on behalf of the Department. Applicant was represented by Tommye Morehead Frost, Esq., Senior Vice President and Chief Regulatory Counsel, Chicago Title Insurance Company, and David

Hancock, Esq., of Dewey & LeBoeuf. Applicant presented testimony in favor of the acquisition through Anthony J. Park, Chief Financial Officer for Fidelity National Financial, Inc., Peter Sadowski, Chief General Counsel of Fidelity National Financial, Inc., and Dr. Gregory S. Vistnes, an economist specializing in competitive analysis. Exhibits were offered by Applicant and the Department, and received into the record. Applicant waived the twenty day notice of hearing. Applicant provided Title Insurers with at least seven days' notice of hearing.

STATEMENT OF ISSUE

The issue in this proceeding is whether any of the disqualifying conditions set forth in *Neb. Rev. Stat.* §44-2127(1) exist with regard to the application to acquire control of the Title Insurers. On the basis of the filings, correspondence and information provided to the Department, the Director of Insurance ("Director") approves the application and finds, concludes and orders as follows:

FINDINGS OF FACT

A. Commonwealth Land Title Insurance Company and Lawyers Title Insurance Corporation.

On November 26, 2008, the Department received a verified Form A from the Applicant for approval to acquire control of the Title Insurers through the purchase of Title Insurers' stock from the parent corporation, LandAmerica Financial Group, Inc., ("LFG"). The application and subsequent amendments were filed pursuant to the Insurance Holding Company System Act, *Neb. Rev. Stat.* §44-2120, *et seq.*, specifically §44-2126. The acquisition will result in Applicant acquiring control of the Title Insurers as control is defined in the Act.

Commonwealth Land Title Insurance Company, in Rehabilitation, is organized under and governed by the laws of the State of Nebraska and obtained its Certificate of Authority to transact title insurance business in this state on November 11, 1958. It is authorized to transact insurance in 48 other states plus the District of Columbia.

Lawyers Title Insurance Corporation, in Rehabilitation, is organized under and governed by the laws of the State of Nebraska and obtained its Certificate of Authority to transact title insurance business in this state on May 19, 1954. It is authorized to transact insurance in 48 other states plus the District of Columbia.

The Title Insurers were ordered into rehabilitation on November 26, 2008, in Cases CI08-5131 and CI08-5132, in the District Court of Lancaster County, Nebraska, due to their deteriorating financial condition. Also on or about November 26, 2008, LFG filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Eastern District of Virginia, Case No.: 08-35994. A hearing in the bankruptcy court is scheduled for December 16, 2008, to consider Applicant's Stock Purchase Agreement filed in the LFG proceedings.

B. Applicant.

Applicant Fidelity National Financial, Inc. is a publicly traded corporation organized under the laws of the State of Delaware maintaining its principal office in Jacksonville, Florida. Applicant is structured as a holding company with operations conducted through a number of subsidiary insurance companies, including Chicago Title Insurance Company, a Nebraska domiciled title insurer, and Fidelity National Title Insurance Company, a California domiciled title insurer. Through its subsidiaries and

affiliates, Applicant provides core title insurance, escrow, and other title-related services including collection and trust activities, trustee's sales guarantees, recordings, and reconveyances. Through its specialty insurance subsidiaries, Applicant also provides flood insurance, personal lines insurance, and home warranty insurance. Applicant's market share of all insurance regulated title services provided in Nebraska is currently 19.38%, with its national market share of such title services including Nebraska, being 26.35%.

Applicant seeks to acquire Commonwealth as a subsidiary of Chicago Title, a Nebraska domestic insurer. Applicant seeks to acquire Lawyers Title as a subsidiary of Fidelity National Title, a California domestic insurer. Applicant seeks to acquire other insurers not domiciled in Nebraska. Applicant's stock is currently owned by various public investors. To Applicant's knowledge, no person holds ten percent or more of Applicant's voting securities.

Applicant has filed all the documents and information required by law and requested by the Department.

C. Grounds to Disqualify as Set Forth in *Neb. Rev. Stat. §44-2127(1)*.

(1) Requirements to Transact Insurance, *Neb. Rev. Stat. §44-2127(1)(a)*.

By filing this Form A application, Applicant requests approval from the Director to acquire all of the issued and outstanding shares of Title Insurers. The total amount of consideration for the purchase of the Title Insurers is approximately \$282,000,000. Additionally, the Applicant has committed to contributing \$157,000,000 upon closing into the Title Insurers in order to recapitalize the companies so they may continue to

write insurance for the lines they are presently authorized to write. The remainder of the consideration will be paid to LFG for distribution through the bankruptcy estate.

Approximately \$182,000,000 of the purchase price will be funded with available cash of the Applicant. Applicant will fund the remainder of the purchase, \$100,000,000, through a subordinated note and shares of its common stock. Applicant will close the transaction on or before December 22, 2008.

(2) Effect on Competition in this State or Risk of Monopoly, *Neb. Rev. Stat.* §44-2127(1)(b).

Nationally, Applicant will hold approximately 45.91% of the title insurance market if this acquisition is approved. In such large holdings, it can be said that the ability to lessen competition should be reviewed closely. Under current law, the Department is restricted to opining only with regard to the competitive impact on Nebraska. The national issue of competitive markets is one currently pending before the Federal Trade Commission (FTC) and direction is expected on this issue this week. The Department understands the direction provided by the FTC may or may not have implications on the sale.

As regards the Nebraska marketplace, Applicant will hold approximately 41.09% of the Nebraska title insurance market if the transactions are approved. Unlike other insurance sectors where this amount of concentration per se would be objectionable as anti-competitive, title insurance is unique. Title insurance historically has been a permitted oligopoly, with roughly 90% of all title insurance written by insurers under the control of five groups as a permissible level of concentration. This larger concentration

of market shares in Nebraska is permissible in title insurance under the state action doctrine which allows immunity from competitive concerns provided a state exercises sufficient independent judgment and control over these issues ¹.

Nebraska exercises this judgment and control in two regards. First, Nebraska requires prior approval of rates. The regulatory scheme requires rate submissions with analysis of need and impact on the market place for consideration. Moreover, *Neb. Rev. Stat. §44-1991* sets forth specific requirements in the event concentration exceeds 20% in any one insurer. That is, Nebraska has a regulatory scheme to permit concentration in excess of 20% based on considerations contained in *Neb. Rev. Stat. §44-1991(2)*. It is in the best interest of the public to apply this immunity analysis conservatively to the entire Fidelity group. In so doing, it cannot be said that the acquisition adversely affects the financial solidity of Applicant based upon financial information filed with the Department, a factor set forth at *Neb. Rev. Stat. §44-1991(2)(a)*. Moreover, it cannot be said that *Neb. Rev. Stat. §44-1991(2)(b)* would prohibit the transaction. Roughly 91% of all title insurance business in Nebraska is transacted through independent agents. The title insurers have a long history of doing business in the state and do not impact this decision one way or another under *Neb. Rev. Stat. §44-1991(2)(c)*.

As regards *Neb. Rev. Stat. §44-1991(2)(d)*, reinsurance arrangements are widely available both with domestic insurers and through nonaffiliated reinsurers. *Neb. Rev. Stat. §44-1991(2)(e)* addresses the profitability of the acquired business. The Title Insurers have lost substantial surplus and are not profitable. *Neb. Rev. Stat. §44-*

¹ Federal Trade Commission v Ticor Title Insurance Company, 504 US 621, 112 SCT 2169 (1992).

1991(2)(f) is not applicable. *Neb. Rev. Stat. §44-1991(2)(g)* allows consideration of “any other circumstance deemed appropriate.” In this instance, the Title Insurers are in rehabilitation with deteriorating financial condition, and without recapitalization by LFG, the Title Insurers must be sold or ordered to cease writing. The gravity of a lack of guaranty fund protection for current policyholders nationwide and the risk of harm to them must be weighed against competitive implications on Nebraskans that can be monitored effectively.

(3) The financial condition of Applicant, *Neb. Rev. Stat. §44-2127(c)*.

The financial condition of Applicant is strong. Financial information provided to the Department, does not indicate this would be a concern, although Applicant, along with its competitors, are immersed in a troubled market with revenues on the decline.

(4) Future Plans of Applicant for Title Insurers, *Neb. Rev. Stat. §44-2127(d)*.

Applicant has no plans to declare an extraordinary dividend, liquidate the Title Insurers, sell the assets of or consolidate or merge the Title Insurers with any person without the prior approval of the Director. Applicant does intend to change the management of the Title Insurers to include persons currently managing Applicant’s title insurance companies. In addition, Applicant will enter into a Transition Services Agreement with LFG to continue to use services currently provided to the Title Insurers by affiliates of LFG that are not being acquired until Applicant makes necessary arrangements to replace said services.

(5) Competence of Applicant, *Neb. Rev. Stat. §44-2127(e)*.

Applicant is currently in the title insurance business and appreciate the challenges of the current marketplace. Applicant does intend to change the management of the Title Insurers.

(6) Demutualization, *Neb. Rev. Stat. §44-2127(f)* is not applicable.

(7) Impact on the Public, *Neb. Rev. Stat. §44-2127(g)*.

Applicant acknowledges that this transaction also requires approval by the Federal Bankruptcy Court in the Eastern District of Virginia and clearance must be obtained under the federal Hart-Scott-Rodino Act by the Federal Trade Commission. Applicant is in the business of title insurance and is presently reinsuring all new policyholders regardless of where located. This will also cease in the event the sale does not occur. The Director has considered, among other things, the impact upon competition in the title insurance business and weighed the public benefits of going forward with this acquisition, and determined the public benefits of protecting policyholders by proceeding with the acquisition exceed the benefits of disapproving the sale in attempt to maintain current market share concentration.

CONCLUSIONS OF LAW

1. The Department and Director have jurisdiction over the subject matter of this proceeding.
2. On the basis of the materials filed, correspondence received and evidence presented at the hearing, the Director has reason to believe that:
 - a. After the acquisition, the Title Insurers will satisfy the requirements for issuance of a Certificate of Authority to conduct business of title insurance in the State of Nebraska.

b. The effect of the acquisition will not substantially lessen the competition in insurance in the State of Nebraska nor tend to create a monopoly therein nor violate the laws of the State of Nebraska.

c. The financial condition of Applicant is such that it would not jeopardize the financial stability of the Title Insurers or prejudice the interest of the policyholders of the Title Insurers.

d. The Applicant has no plans or proposals to liquidate the Title Insurers, to sell the assets of any of the Title Insurers without the approval of the Department, to consolidate or merge any of the Title Insurers with any person or persons without approval of the Department, or to make any other material change in the business operations or corporate structures of management which would be unfair and unreasonable to policyholders of the Title Insurers and not in the public interest.

e. The competence, experience and integrity of those persons who would control the operation of the Title Insurers are such that it would be in the interest of the policyholders of the Title Insurers and the public to allow the acquisition.

f. Applicant is not subject to the provisions of *Neb. Rev. Stat. §44-6115* under the Demutualization Act; and

g. The acquisition is not likely to be hazardous or prejudicial to the public.

ORDER

IT IS THEREFORE ORDERED that the Applicant is approved to acquire all of the issued and outstanding shares of the Title Insurers which will result in Applicant acquiring control of the Title Insurers with closing to occur on or before December 22, 2008.

Within fifteen (15) days after the closing of this transaction, Applicant shall file an amendment to its Insurance Holding Company System Registration Statement in accordance with *Neb. Rev. Stat. §44-2132, et seq.*

Dated this 15th day of December, 2008.

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE


ANN M. FROHMAN
Director of Insurance

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was sent to
Tommye Morehead Frost, Senior Vice President and Chief Regulatory Counsel, Chicago
Title Insurance Company, 601 Riverside Avenue, Jacksonville, FL 32204 by U.S. Mail,
postage prepaid, on this 15 day of December, 2008.

